

UNITED STATES DISTRICT COURT
DISTRICT OF THE VIRGIN ISLANDS
ST. CROIX DIVISION

MOUNT EAGLE PROPERTIES, LLC,
NORTHSTAR INVESTMENTS, LLC,
US VIKING, LLC, WILLIAM V.
NEVILLE III, CONNIE J. NEVILLE,
ELIZABETH L. NEVILLE, and
WILLIAM V. NEVILLE IV,

Plaintiffs,

V.

CASE NO. _____

INTERNAL REVENUE SERVICE,

Defendant.

PLAINTIFFS' ORIGINAL COMPLAINT

For their complaint against Defendant the Internal Revenue Service (“IRS”), Plaintiffs, Mount Eagle Properties, LLC, Northstar Investments, LLC, US Viking, LLC, William V. Neville III, Connie J. Neville, Elizabeth L. Neville, and William V. Neville IV, show the following facts:

Preliminary Statement

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, to compel disclosure of IRS records, documents, opinions, correspondence, presentations and other information in the possession of the Defendant that have been unlawfully withheld.

Parties, Jurisdiction, and Venue

1.

Plaintiffs reside and have their principal place of business in the U.S. Virgin Islands, and are the requesters of agency records that have been improperly withheld.

2.

Defendant is an agency of the United States government, within the meaning of 5 U.S.C. § 552(f) and has possession and control over documents and materials that Plaintiffs seek pursuant to a FOIA request. To the extent that some of the records requested are within the possession of the Virgin Islands Bureau of Internal Revenue, the FOIA request served on the Internal Revenue Service compels the production of those documents within the possession of the Virgin Islands Bureau of Internal Revenue in that a) the Virgin Islands Government is an instrumentality of the federal government, and b) the two agencies have entered into a series of information sharing agreements.

3.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 2201-2202.

4.

Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

General Allegations

5.

The FOIA, 5 U.S.C. § 552 *et seq.*, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

6.

An agency must respond to a party making a FOIA request within twenty (20) working days, notifying that party of the agency's determination whether it will comply with the request and the reasons therefor, and of the right to appeal any adverse decision. 5 U.S.C. § 552(a)(6)(A)(i).

7.

Once an agency fails to comply with applicable time limits, the FOIA requester shall be deemed to have exhausted its administrative remedies with respect to the request. 5 U.S.C. § 552(a)(6)(C)(i).

8.

If an adverse determination is made, or if no determination is made, within the time limits prescribed by law, the FOIA requester may commence an action in a United States district court in the district where it resides, and the district court, upon receipt of a complaint, may "enjoin the agency from withholding agency records and...order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

9.

On June 18, 2007, Plaintiffs submitted, by letter to Defendant's Baltimore, Maryland Disclosure Office, a FOIA request seeking information regarding Plaintiffs for tax years 1997 through 2006. An authentic duplicate of Plaintiffs' letter is attached hereto as **Exhibit "A."**

10.

On July 16, 2007, Defendant sent Plaintiffs a letter informing them that it was unable to fully respond to their request within the 20 business-day period prescribed by law, and that Plain-

tiffs could expect a response by September 21, 2007. An authentic duplicate of Defendant's letter is attached hereto as **Exhibit "B."**

11.

On July 17, 2007, Plaintiffs' counsel, Sheldon Kay (hereinafter referred to as "Plaintiff's counsel"), had a telephone conference with a representative of Defendant in Defendant's Disclosure Office to discuss the request and was told that no records had yet been received by the Disclosure Office.

12.

On September 17, 2007, Defendant informed Plaintiffs by letter that it was still processing their request, and if Defendant was unable to respond by November 30, 2007, it would contact Plaintiffs to inform them of the status of their request. An authentic duplicate of Defendant's letter is attached here to as **Exhibit "C."**

13.

On September 20, 2007, Plaintiffs' counsel called Defendant's Disclosure Office to discuss the response to the FOIA request, to determine its status and to offer to review any available files so that copies would not have to be made to expedite the process.

14.

On September 21, 2007, Plaintiffs' counsel received a telephone message from a representative in Defendant's Disclosure Office indicating that the Disclosure Office was still waiting to receive the documents from the Defendant's Revenue Agent.

15.

On October 29, 2007, Plaintiffs' counsel and representatives in Defendant's Disclosure Office participated in a conference call to discuss the overdue response to Plaintiffs' FOIA request.

16.

On the October 29, 2007 conference call, Plaintiffs' counsel discussed the delays in the response and attempted to reach an agreement to receive the information requested. Defendant's representatives represented that the Disclosure Office could provide a partial response by the end of the month. Further, Defendant's representatives stated that they would discuss the delay in getting the responsive documents from Defendant's Revenue Agent with the Revenue Agent's manager in order to attempt to get the responsive documents that still had not been provided.

17.

On November 8, 2007, Plaintiffs' counsel again discussed the FOIA request with a representative in Defendant's Disclosure Office and was informed that the Disclosure Office would not receive the Revenue Agent's work papers until the middle of December. The representative indicated that the Disclosure Office had received a box of approximately 5,000-6,000 pages and had not yet reviewed them. Defendant's representative also indicated that if the FOIA request, specifically paragraph No. 4, was limited, the Disclosure Office could respond by the middle of December 2007.

18.

On November 12, 2007, Plaintiffs' counsel sent a letter to Defendant's Disclosure Office narrowing the information requested in Paragraph No. 4 of the FOIA request. An authentic duplicate of Plaintiffs' counsel's letter is attached hereto as **Exhibit "D."**

19.

On November 29, 2007, Defendant informed Plaintiffs by letter that it was still processing their request, and if Defendant was unable to respond by January 31, 2008, it would contact Plaintiffs to inform them of the status of their request. An authentic duplicate of Defendant's letter is attached hereto as **Exhibit "E."**

20.

Also on November 29, 2007, Plaintiffs' counsel spoke with a representative in the Disclosure Office and was advised that responses were coming in from other areas of the IRS and that documents from Defendant's Revenue Agent had been received but not yet reviewed.

21.

On November 30, 2007 and December 3, 2007, Plaintiffs' counsel left telephone messages for representatives in Defendant's Disclosure Office.

22.

On December 4, 2007, a representative in Defendant's Disclosure Office called Plaintiffs' counsel and explained that a response was still not available and that a number of Defendant's employees would be out of the office during the month of December. The representative stated that some of the files could be turned over by the end of the next week.

23.

On December 13, 2007, Defendant provided a partial response to Plaintiffs' FOIA request. Defendant, in its partial response, indicated that it had located 4,297 pages of information responsive to Plaintiffs' request, of which 44 pages were withheld in part and 64 pages were withheld in full. An authentic duplicate of Defendant's response is attached hereto as **Exhibit "F."**

24.

Defendant's response indicated that exemptions were being claimed under 5 U.S.C. §§ 552(b)(3), (b)(7)(A), (b)(7)(C) and (b)(7)(E). *See Exhibit "F."* For the 64 pages withheld in full, the Defendant simply inserted a page listing the exemption subsection and number of pages withheld. *Id.* For the pages withheld in part, the Defendant indicated the partial page and included a handwritten exemption subsection, for example "(b)(3)." *Id.*

25.

Defendant did not provide any further explanation for the claimed exemptions, although Plaintiffs in their initial request specifically requested the following:

If you determine that some portions of the requested materials are exempt, I understand and expect that you will provide the remaining segregated nonexempt portions. Additionally, if all or any part of this request is denied, please provide the following for each document or segment:

- The author or authors of the document or segment;
- To whom the document or segment was addressed;
- Any parties copied on the document or segment;
- A description of the document or document segment being withheld;
- Any person or persons not listed on the document or segment who received, reviewed or had discussions regarding the document or segment;
- Any third-party who received, reviewed or had discussions regarding the document or segment;
- If known, who had access to the document or segment; and
- A description of the statutory exception relied on as a basis for that action and an explanatory statement concerning the applicability of said exception.

See Exhibit "A."

26.

On January 9, 2008, Plaintiffs' counsel left a telephone message for a representative in Defendant's Disclosure Office, inquiring as to the time frame for receipt of the remaining responsive documents to the FOIA request.

27.

On January 10, 2008, a representative in Defendant's Disclosure Office responded that documents were still being reviewed and that Defendant could not give a time frame or even an anticipated time frame for completion of review.

28.

On January 29, 2008, Defendant informed Plaintiffs by letter that it was still processing this request, and if Defendant was unable to respond by March 31, 2008, it would inform them of the status of their request. An authentic duplicate of Defendant's letter is attached hereto as **Exhibit "G."**

29.

On January 30, 2008, Plaintiffs' counsel had a telephone conference with a representative in Defendant's Disclosure Office. Plaintiff's counsel was told by the representative that she had discussed with her manager giving Plaintiffs an index of the documents withheld but was instructed that Defendant was not required to provide any such index and, therefore, would not provide the requested index.

30.

Also on January 30, 2008, Plaintiffs' counsel had a telephone conference with the Defendant's Disclosure Office representative's manager. On that call, Plaintiffs' counsel requested an index of the documents withheld. The manager indicated that Defendant is not required to pro-

vide an index and that she was advised by Defendant's counsel that Defendant never releases such an index. The manager stated further that the only way Plaintiffs would receive an index would be to file suit under 5 U.S.C. § 552.

31.

On February 1, 2008, Defendant provided a further partial response to Plaintiffs' FOIA request. An authentic duplicate of Defendant's response is attached hereto as **Exhibit "H."**

32.

Defendant, in its second partial response, indicated that it had located an additional 2,771 pages of information responsive to Plaintiffs' request, of which 58 pages were withheld in part and 2,428 pages were withheld in full. *See Exhibit "H."*

33.

Defendant's response indicated that exemptions were being claimed under 5 U.S.C. §§ 552(b)(3), (b)(7)(A), (b)(7)(C) and (b)(7)(E). *Id.* For the 2,428 pages withheld in full, the Defendant simply inserted a page listing the exemption subsection and number of pages withheld. *Id.* For the 58 pages withheld in part, the Defendant indicated the partial page and included a handwritten exemption subsection. *Id.*

34.

On February 8, 2008, Defendant provided its final response to Plaintiffs' FOIA request. Defendant, in its final response, indicated that it had located an additional 528 pages of information responsive to Plaintiffs' request, of which 18 pages were withheld in part and 295 pages were withheld in full. An authentic duplicate of Defendant's response is attached hereto as **Exhibit "I."**

35.

Defendant's response indicated that exemptions were being claimed under 5 U.S.C. §§ 552(b)(3), (b)(7)(A), (b)(7)(C) and (b)(7)(E). *See Exhibit "I."* For the 295 pages withheld in full, the Defendant simply inserted pages listing the exemption subsection and number of pages withheld. *Id.* For the 18 pages withheld in part, the Defendant indicated the partial page and included a handwritten exemption citation. *Id.*

36.

Defendant, in each of its responses dated December 13, 2007, February 1, 2008 and February 8, 2008, denied in part Plaintiffs' FOIA request on the grounds that certain of the information requested: was specifically exempted by statute; could reasonably be expected to interfere with enforcement proceedings; could reasonably be expected to constitute an unwarranted invasion of personal privacy; would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; and Internal Revenue Code § 6105 protects U.S. Possession agreements. *See Exhibits "F," "H," and "I."*

37.

For certain of the pages withheld, Defendant has only partially identified the exemption under which the information is being withheld. *Id.*

38.

On February 29, 2008, Plaintiffs submitted by letter an administrative appeal of Defendant's partial denial of its FOIA request. An authentic duplicate of Plaintiffs' appeal letter is attached hereto as **Exhibit "J."**

39.

Defendant's Appeals Office did not complete its consideration of Plaintiffs' appeal within 20 days of receipt of Plaintiffs' appeal and, when it finally completed the review process on April 28, 2008, it summarily affirmed the decision of Defendant's Disclosure Office. An authentic duplicate of Defendant's decision is attached hereto as **Exhibit "K."**

40.

On January 21, 2009, President Barack Obama issued a "Memorandum for the Heads of Executive Departments and Agencies" providing direction regarding application of the FOIA and stating, in part, the following:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

An authentic duplicate of President Obama's Memorandum is attached hereto as **Exhibit "L."**

41.

On March 19, 2009, Eric Holder, the Attorney General of the United States issued a "Memorandum for Heads of Executive Departments and Agencies," which also provided direction to agencies such as Defendant regarding application of the FOIA. Consistent with President Obama's January 21, 2009, Memorandum, the Attorney General stated the following:

[A]n agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. . . .

[T]he Department of Justice will defend a denial of a FOIA request *only* if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.

(emphasis supplied). An authentic duplicate of the Attorney General's Memorandum is attached hereto as **Exhibit "M."**

42.

On or about April 23, 2009, Plaintiffs' counsel called Defendant's Appeals Office and spoke with an Appeals Officer regarding the impact of President Obama's and Attorney General Holder's Memoranda on Plaintiffs' FOIA request.

43.

The Appeals Officer advised Plaintiffs' counsel that, notwithstanding President Obama's and Attorney General Holder's direction to the agencies, Defendant will not change its prior position with respect to Plaintiffs' FOIA request until the field offices receive "guidelines" to be issued from the Office of Information Policy.

44.

On April 29, 2009, Plaintiffs' counsel spoke with a representative of Defendant regarding the status of Plaintiffs' FOIA request and the substance of the Appeals Officer's statements regarding FOIA disclosures. Plaintiffs' counsel confirmed their conversation in an email and requested additional information as to when Defendant would issue new guidelines implementing President Obama's and Attorney General Holder's directives.

45.

Defendant's representative responded to Plaintiffs' counsel's email with an email from Defendant's counsel, stating, in part, that "the IRS believes in transparency, and we will follow the direction set by President Obama."

46.

Defendant has failed and refused to comply with the directives of President Obama and Attorney General Holder regarding FOIA disclosures. Attorney General Holder reiterated the position of the United States on FOIA transparency as recently as June 17, 2009, in testimony before the Senate Judiciary Committee, repudiating the policy of the prior administration:

The Department is committed to an open, transparent, and accountable government. These values are central to our revitalization of the basic traditions of the Department, and are key features of our reform efforts. We issued new comprehensive Freedom of Information Act (FOIA) Guidelines that direct all executive branch departments and agencies to apply a presumption of openness when administering the FOIA. The new Guidelines, announced in a memo to heads of executive departments, build on principles of openness and rescind the guidelines issued by the previous administration. In applying a presumption of openness and disclosure, the new Guidelines stress that agencies should not withhold records simply because they may do so legally; rather, agencies should consider whether any real harm may result from their disclosure. Furthermore, the Guidelines established a new standard for when the Department of Justice will defend an agency that denies a FOIA request. Under the new standard, the Department will defend the agency “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” The new Guidelines also emphasize that open government is everyone’s responsibility. Agencies must work cooperatively with FOIA requesters and should reply in a timely manner...

See Statement of Eric H. Holder Jr., Attorney General of the United States, before the United States Senate Committee on the Judiciary, June 17, 2009, *available at* <http://www.usdoj.gov/ag/testimony/2009/ag-testimony-090617.html>.

47.

Plaintiffs are authorized and entitled to receive the records requested and there is no legal basis for Defendant’s denial of Plaintiffs’ FOIA request.

48.

Defendant willfully withheld responsive documents by claiming exemptions that are without merit as a tactic to interfere with the Plaintiffs' defense of proposed adjustments. For example, Defendant claimed that information regarding communications with third parties, including the names of third parties contacted, were privileged, notwithstanding the fact that the names of witnesses and third party contacts are clearly not exempt from disclosure and are in fact, pursuant to the Internal Revenue Code, subject to disclosure.

Exhaustion of Administrative Remedies

49.

By operation of law as set forth in 5 U.S.C. §§ 552(a)(6), 31 C.F.R. § 1.5(k), and 26 C.F.R. § 601.702(c)(12), Plaintiffs have exhausted their administrative remedies.

50.

Plaintiffs have satisfied all prerequisites to filing this action.

Relief Sought

51.

Plaintiffs are entitled to receive an index of materials withheld by Defendant with a detailed explanation of the reasons each such document was exempt from production.

52.

Plaintiffs are entitled to disclosure of any and all records not exempt pursuant to 5 U.S.C. § 552(b).

53.

Defendant's continued refusal to disclose the records unlawfully withheld is arbitrary and capricious and poses a threat of irreparable injury to Plaintiffs as it will prevent Plaintiffs from

accessing their own tax records and challenging significant, unlawful tax burdens imposed upon them by Defendant.

54.

Plaintiffs are entitled to an award of reasonable costs and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412.

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

- (1) order Defendant to provide an index of materials withheld with a detailed explanation of the reasons each such document was exempt from production;
- (2) perform an in camera review of the records withheld;
- (3) declare that Defendant's refusal to disclose the records requested by Plaintiffs is unlawful;
- (4) order Defendant to disclose the requested records to Plaintiffs;
- (5) expedite its consideration of this action pursuant to 28 U.S.C. § 1657;
- (6) award Plaintiffs reasonable costs and attorneys' fees as provided in 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412; and
- (7) grant such other and further relief as the Court may deem just and proper.

[signatures appear on the next page]

Respectfully submitted,

/s/ David Marshall Nissman

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